

DATE: September 2, 2009

MEMORANDUM TO: Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

FROM: John M. Andersen
Acting Deputy Assistant Secretary
for Antidumping and Countervailing Duty Operations

SUBJECT: Issues and Decision Memorandum for 2007-2008 Antidumping
Duty Administrative Review of Stainless Steel Bar from India

SUMMARY

We have analyzed the case and rebuttal briefs of interested parties in the 2007-2008 administrative review of stainless steel bar from India. As a result of our analysis, we have made changes to the preliminary results. We recommend that you approve the positions described in the "Discussion of the Issues" section of this memorandum. Below is a complete list of the issues in this review for which we received comments and rebuttals from interested parties:

- Comment 1:** Whether to Collapse Venus and Affiliated Producer Sieves
- Comment 2:** Whether Certain U.S. Sales by Venus are Constructed Export Price ("CEP") or Export Price ("EP") Sales and Whether A Principal-Agent Relationship Exists
- Comment 3:** Alleged Reporting Deficiencies for Venus and Sieves:
- 3a:** Bahubali's and Venus Metal's Involvement in the Production/Sale of Stainless Steel Bar
 - 3b:** Hindustan's Involvement in the Production/Sale of Stainless Steel Bar
 - 3c:** Hitech's Involvement in the Production/Sale of Stainless Steel Bar
 - 3d:** Affiliated Party Loans
 - 3e:** Affiliated Party Transactions
- Comment 4:** Whether Respondents Failed to Follow the Procedural Requirements of the Department's Regulations
- Comment 5:** Venus' Request to Revise Its U.S. Sales Database to Reflect a Billing Adjustment
- Comment 6:** Comparison of Certain Similar Merchandise Sold in the Home Market

Comment 7: Whether Certain Home Market Sales are Outside the Ordinary Course of Trade and Whether the Department Should Make a Level of Trade Adjustment

Comment 8: Offsetting Negative Margins

Comment 9: Whether to Rely on Double-Bracketed Information

BACKGROUND

On February 21, 1995, the Department of Commerce (“the Department”) published in the Federal Register the antidumping duty order on stainless steel bar (“SSB”) from India. See Antidumping Duty Orders: Stainless Steel Bar from Brazil, India and Japan, 60 FR 9661 (February 21, 1995). On February 4, 2008, the Department published a notice in the Federal Register providing an opportunity for interested parties to request an administrative review of the antidumping duty order on SSB from India for the February 1, 2007, through January 31, 2008, period of review (“POR”). See Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation: Opportunity To Request Administrative Review, 73 FR 6477 (February 4, 2008). This review covers imports of SSB from one producer/exporter: Venus Wire Industries Pvt. Ltd. (“Venus”). On March 6, 2009, the Department published its Preliminary Results in the Federal Register. See Stainless Steel Bar From India: Preliminary Results of Antidumping Duty Administrative Review, 74 FR 9787 (March 6, 2009) (“Preliminary Results”).

Following the Preliminary Results, the Department issued supplemental questionnaires to Venus in March and April 2009. The Department received Venus’ responses in March, April and May 2009. On April 27, 2009, the Department published a notice extending the deadline for these final results to September 2, 2009. See Stainless Steel Bar From India: Extension of Time Limit for the Final Results of the 2007–2008 Antidumping Duty Administrative Review, 74 FR 19048 (April 27, 2009).

On July 17, 2009, we issued our post-preliminary results calculation memorandum regarding Sieves Manufacturing Pvt. Ltd. (“Sieves”) based on the totality of information submitted by interested parties. See Memorandum to File, Acting Assistant Secretary for Import Administration, entitled “Post-Preliminary Results Calculation Memorandum for Venus Wire Industries Pvt. Ltd.”, dated July 17, 2009, which is on file in the Central Records Unit (“CRU”). On July 23, 2009, the Department amended its post-preliminary results. See Memorandum to the File from Erika McDonald, “Correction to the Post-Preliminary Results Calculation Memorandum for Venus Wire Industries Pvt. Ltd.” dated July 23, 2009, which is on file in the CRU.

We invited interested parties to comment on the Preliminary Results. On July 31, 2009, Venus filed its case brief which contained business proprietary information under the one-day lag rule. On August 3, 2009, Venus filed attachments to its case brief that were omitted from its original case brief submitted on July 31, 2009. On August 5, 2009, the Department notified Venus that it was rejecting its case brief because the copy of the case brief filed on July 31, 2009, was not identical to the business proprietary copy filed on August 3, 2009, pursuant to 19 CFR 351.303(c)(2).

The Department permitted Venus to resubmit its case brief with bracketing corrections to its July 31, 2009 submission, but excluding the attachments because the attachments were determined to contain new factual information. See Letter from Brandon Farlander to Venus, dated August 5, 2009, and Letter from Brandon Farlander to Venus, dated August 6, 2009. Venus resubmitted its case brief on August 6, 2009. On August 3, 2009, Petitioners filed a case brief.¹ On August 11, 2009, Petitioners and Venus filed rebuttal briefs. We held a closed hearing on August 13, 2009.

DISCUSSION OF THE ISSUES

Comment 1: Whether to Collapse Venus and Affiliated Producer Sieves

Venus' Argument: Venus disagrees with the Department's preliminary finding that Venus and Sieves are affiliated. While Venus acknowledges that there are family relationships between shareholders in the two companies, Venus argues there is no operational control of one company over the other because there are no common owners. In these circumstances, according to Venus, section 771(33) of the Tariff Act of 1930, as amended ("the Act"), and 19 CFR 351.102, require the Department to find that Venus has the potential to control Sieves or vice versa and more particularly, to control the other company's prices, sales or production. Since Venus and Sieves are competitors, no such control exists.

Even if the Department determines that Venus and Sieves are affiliates, Venus argues that the Department should not collapse the two entities because they do not meet all the required criteria under the Department's collapsing test. Specifically, according to Venus, there is not a significant potential for manipulation of prices and production. In particular, Venus points out that Sieves has no U.S. sales and, hence, no interest in determining or influencing Venus' U.S. prices. Moreover, Venus claims there is no evidence that the operations of the two companies were intertwined. To the contrary: (1) there were no transactions between Sieves and Venus; (2) the companies do not use each other's manufacturing facilities; (3) the companies do not share employees (including sales people) or information; (4) there is no transfer of business between the companies, nor joint marketing activities; (5) no inquiries are received by one company on behalf of the other and if an inquiry cannot be filled by one, it is not referred to the other; and (6) neither company shows the other as a "sister" or affiliate in its marketing materials.

Venus concludes by reiterating that Venus and Sieves are competitors. According to Venus, Sieves participated in this review on Sieves' own accord, and did not share its sales and cost data with Venus. In such circumstances, Venus is unfairly disadvantaged in defending itself. Venus asks the Department to treat the two companies separately, as it did in prior reviews.

Petitioners' Rebuttal: Petitioners assert that the Department should reject Venus' arguments and affirm the affiliation and collapsing finding for the final results.

¹ Petitioners are, collectively, Carpenter Technology Corp.; Crucible Specialty Metals, a division of Crucible Materials Corp.; Electroalloy Co.; a G.O. Carlson, Inc. company; and Valbruna Slater Stainless, Inc.

Petitioners contend that Venus' argument concerning affiliation is flawed because the Department's regulations do not limit the definition of affiliated parties to only those companies that have common owners. See section 771(33) of the Act. Moreover, Petitioners discount Venus' argument concerning control pointing to, inter alia, the fact that the Bohra family held the majority of the seats in both companies' board of directors, and that Bohra family members owned more than 89 percent of the shares of Venus and 100 percent of Sieves.² Petitioners argue further that while Venus did not address the second prong of the collapsing criteria, i.e., whether Venus and Sieves had similar or identical production facilities, record evidence demonstrates that Venus and Sieves have similar or identical production facilities.³ With regards to the third prong of the test for collapsing, i.e., significant potential for manipulation of price and production, Petitioners contend that Venus' arguments do not address the issue at hand. Instead, Venus makes several claims which, taken individually or together, do not dispute the fact that the Bohra family is "in a position to have significant influence over the production and sales of both companies,"⁴ and that there is "significant potential for manipulation of price or production".⁵

Department's Position: For the final results, we continue to find that Venus and Sieves are affiliated. Section 771(33)(F) of the Act states that "two or more persons directly or indirectly controlling, controlled by, or under common control with any person" shall be considered affiliated. The Department focuses its analysis on one company's ability to control the other and does not require evidence of the actual exercise of control by one party over the another. See Antidumping Duties; Countervailing Duties; Final rule, 62 FR 27296, 27298 (May 19, 1997) ("Preamble"). As defined further by section 771(33) of the Act, "a person shall be considered to control another person if the person is legally or operationally in a position to exercise restraint or direction over the other person."

Venus contends that it does not control Sieves and vice versa. In the Collapsing Memo, we explained that, pursuant to section 771(33)(A) of the Act, the various members of the Bohra family are affiliated and form a family grouping.⁶ Additionally, we stated that based on the near complete control by the Bohra family as majority shareholders and directors of both companies, inter alia, that the Bohra family grouping is in a position to exercise restraint or direction over Venus and Sieves. Thus, contrary to Venus' and Sieves' claim, the Bohra family grouping does have operational control of the two companies and, therefore, the two companies are affiliated

² See Memorandum to Susan H. Kuhbach, Senior Office Director, from Scott Holland, International Trade Analyst, entitled "Whether to Collapse Venus Industries Pvt., and Sieves Manufacturing Pvt. Ltd. in the Preliminary Results," dated March 2, 2009 ("Collapsing Memo") at 6.

³ See Venus' May 14, 2008, Section A Response to the Questionnaire ("AQR") at 3-4, and 6; see also Collapsing Memo at 2 and 8.

⁴ See Collapsing Memo at 9.

⁵ See id.

⁶ See Collapsing Memo at 6.

under section 771(33)(F) of the Act.⁷ We have analyzed the record with respect to control and have determined that the specific facts of this case warrant finding affiliation between Venus and Sieves for the final results.

Additionally, we agree with Petitioners that Venus and Sieves should continue to be collapsed for the final results. According to 19 CFR 351.401(f)(1), the Department will collapse two companies when: 1) the companies are affiliated; 2) they have production facilities for identical or similar products; and 3) there is a significant potential for the manipulation of price and production. As explained above, we find that Venus and Sieves are affiliated. Second, as Petitioners point out, Venus and Sieves do not dispute that they produce similar merchandise. Instead, Venus and Sieves contend the Department's analysis regarding the "significant potential for manipulation" criterion.

In that regard, 19 CFR 351.401(f)(2) specifies factors that the Department may consider in identifying significant potential for price or product manipulation: i) the level of common ownership; ii) the extent to which managerial employees or board members of one firm sit on the board of directors of an affiliated firm; and iii) whether operations are intertwined, such as through the sharing of sales information, involvement in production and pricing decisions, the sharing of facilities or employees, or significant transactions between the affiliated producers.

The court has recognized that when determining whether there is a significant potential for manipulation these three factors "are considered by Commerce in light of the totality of the circumstances; no one factor is dispositive in determining whether to collapse the producers." See Turkish Pipe.⁸ Additionally, Commerce looks for "relatively unusual situations, where the type and degree of relationship is so significant that {it} finds that there is a strong possibility of price manipulation."⁹

Further, when affiliation is based upon control, there may be substantial overlap between evidence relied upon to determine affiliation and that relied upon to determine whether there is a significant potential for the manipulation of price or production. The decision of whether to collapse is normally dependent to one extent or another upon the potential of one or more persons or a part of a company to control another.¹⁰ See India Pipes and Tubes. As we have

⁷ See id.

⁸ See Koyo Seiko Co., Ltd. v. United States, 516 F. Supp. 2d 1323, 1346 (Ct. Int'l Trade 2007) ("Koyo Seiko"), citing to Light-Walled Rectangular Pipe and Tube From Turkey: Notice of Final Determination of Sales at Less Than Fair Value, 69 FR 53675, (September 2, 2004) ("Turkish Pipe") and accompanying Issues and Decision Memorandum at Comment 10.

⁹ Koyo Seiko citing Nihon Cement Co. v. United States, 17 C.I.T. 400, 426 (Ct. Int'l Trade 1993) ("Nihon Cement") (quoting Final Determination of Sales at Less than Fair Value: Antifriction Bearings (Other than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, 54 FR 18992, 19089 (May 3, 1989)).

¹⁰ See Certain Welded Carbon Standard Steel Pipes and Tubes from India; Final Results of New Shippers Antidumping Duty Administrative Review, 62 FR 47632 (September 10, 1997) ("India Pipes and Tubes").

often stated, in collapsing, we look at the “level of inter-relatedness between parties” or the “type and degree” of the parties’ relationship or affiliation.¹¹

We acknowledge, as Venus and Sieves claim, that there is no information on the record in the current review to indicate that the operations of the two companies are directly intertwined and that Sieves did not export stainless steel bar to the United States. However, as noted above, not all factors listed under 19 CFR 351.401(f)(2) need to be present in order to collapse companies and our decision to collapse Venus and Sieves is based on the totality of circumstances. See Turkish Pipe and Preamble at 62 FR 27346. Here, we find that the high level of ownership of the two companies’ shares by the Bohra family grouping and its dominance of the companies’ boards, as well as another factor related to the Bohra family involvement in the operations of the two companies,¹² clearly shows that the Bohra family has the ability and financial incentive to coordinate their actions in order to direct Venus and Sieves to act in concert or out of common interests. As mentioned above, the Department is not required to find that the two companies have acted in concert. Rather the Department is concerned with the potential for the two companies to act in concert or out of common interests. See Turkish Pipe.

Comment 2 Whether Certain U.S. Sales by Venus are Constructed Export Price (“CEP”) or Export Price (“EP”) Sales and Whether A Principal-Agent Relationship Exists

Petitioners’ Argument: Petitioners claim that Venus was affiliated with AMS Specialty Steel (“AMS”) during the POR by virtue of a principal-agent relationship. The evidence cited by Petitioners in support of their claim that Venus had control of AMS is summarized below. Because of this alleged affiliation, Petitioners contend that Venus should have reported its sales through AMS as CEP sales, rather than as EP sales to AMS. According to Petitioners, this reporting failure means that the Department does not have the correct U.S. sales database for Venus. Petitioners claim, therefore, that Venus’ dumping margin should be based on adverse facts available (“AFA”). See Petitioners’ May 20, 2009, letter, which is incorporated into Petitioners’ case brief as an attachment.

Venus’ and Sieves’ Rebuttal: Venus and Sieves assert that AMS is not an affiliate of Venus, and they support the Department’s preliminary determination that these sales are properly reported as EP sales.

¹¹ See India Pipes and Tubes citing Sulfanilic Acid from the PRC: Final Results of Antidumping Duty Administrative Review, 61 FR 53,711, 53,712 (1996) (citing Nihon Cement; Final Results of Antidumping Administrative Review; Iron Construction Castings from Canada, 59 FR 25603, 25603-604 (1994), Final Determination of Sales at Less than Fair Value: Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from the Federal Republic of Germany, 54 FR 18992, 19089 (1989).

¹² See Collapsing Memo at 6, for business proprietary information regarding further involvement of the Bohra family in the operations of Venus and Sieves.

Department's Position: We have carefully examined the claims and arguments submitted by Petitioners in their May 20, 2009, letter and case brief, and continue to find that Venus and AMS are not affiliated as principal/agent.

Venus claims,¹³ and Petitioners do not dispute, that there was no agency agreement between Venus and AMS during the POR. Nevertheless, the Department has previously found principal/agent relationships to exist where there is no formal agreement.^{14,15} In such situations, the Department examines a range of criteria to determine whether the reseller is acting primarily for the benefit of the principal, not for itself:^{16,17}

- (1) the foreign producer's role in negotiating price and other terms of sale;
- (2) the extent of the foreign producer's interaction with the U.S. customer;
- (3) the means of marketing a product by the producer to the U.S. customer in the pre-sale period;
- (4) whether the identity of the producer on sales documentation inferred such an agency relationship during the sales transactions;¹⁸
- (5) whether the agent/reseller takes title to the merchandise and bears the risk of loss;
- (6) whether the agent/reseller maintains inventory; and
- (7) whether the agent/reseller further processes or otherwise adds value to the merchandise.

The Department will consider these criteria together in order to capture the "totality of the circumstances" of a principal/agent relationship.¹⁹

The evidence cited by Petitioners regarding each of these criteria is summarized below (to the extent that it is public), along with the information Venus provided. Our analysis follows.

¹³ See Venus' December 31, 2008, supplemental questionnaire response at 18, which was refiled on January 14, 2009, with corrected bracketing, and Venus' February 4, 2009, supplemental questionnaire response at 1.

¹⁴ See Notice of Final Results of Antidumping Duty Administrative Review: Furfuryl Alcohol From the Republic of South Africa, 62 FR 61084, 61088 (November 14, 1997).

¹⁵ See Notice of Final Determination of Sales at Less Than Fair Value: Engineered Process Gas Turbo-Compressor Systems, Whether Assembled or Unassembled, and Whether Complete or Incomplete, from Japan, 62 FR 24394, 24402-403 (May 5, 1997) ("Gas Turbo-Compressor").

¹⁶ See Gas Turbo-Compressor, 62 FR at 24403.

¹⁷ See Stainless Steel Sheet and Strip From Taiwan; Final Results and Partial Rescission of Antidumping Duty Administrative Review, 67 FR 6682 (February 13, 2002) and accompanying Issues and Decision Memorandum at Comment 23 ("SSSS from Taiwan"); see also Gas Turbo-Compressor.

¹⁸ See SSSS from Taiwan, 67 FR 6682; and accompanying Issues and Decision Memorandum at Comment 23; see also Gas Turbo-Compressor, 62 FR at 24402-403.

¹⁹ See Gas Turbo-Compressor, 62 FR at 24403.

Consistent with our position in Comment 9, we have not relied upon any information that Petitioners provided in double brackets.²⁰

1. Foreign producer's role in negotiating price and other terms of sale: Venus claims that it played no role in setting the prices or terms of sale to AMS' customers, and that it did not pay a commission to AMS.²¹ Petitioners contest this, relying on business proprietary information from an affidavit. See Final Results Calculation Memorandum for Venus Wire Industries Pvt. Ltd., dated September 2, 2009 ("Final Calculation Memo") for details.

The Department finds that the affiant's statement does not indicate that Venus was involved in negotiating the price or any other terms of the sales with AMS's customers in the United States. Because AMS is a reseller, the price paid by the U.S. customer would certainly be related to or affected by the price between Venus and AMS, but the evidence does not indicate that Venus personnel were in contact with the AMS's customers in the price negotiation phase of the sale, nor that there was any back and forth between Venus and AMS as AMS made sales of Venus-produced merchandise. Regarding commissions paid to AMS, we requested certain documents from Venus (sales traces, ledgers) and found no evidence that it paid commissions to AMS.^{22,23}

2. Extent of foreign producer's interaction with U.S. customers: Petitioners claim that Venus interacted with the U.S. customers through AMS. Moreover, based on information from Venus' questionnaire responses, Petitioners claim that: (i) the end customers in the United States knew that Venus was the manufacturer and (ii) that Venus knew the identity of AMS's customers because AMS's purchase order always identified the name of the customer. Petitioners contend that if AMS were an arms-length customer of Venus, AMS would not share its customers' names in this manner because the "customer list is the sole basis for (AMS's) commercial livelihood and survival in the workplace." Furthermore, Petitioners argue that certain activities of other U.S. customers of Venus support their argument.²⁴ However, this information is business proprietary and is discussed in the Final Calculation Memo. See Final Calculation Memo. Also, Petitioners identify only one example of direct contact between Venus and AMS's customers: this occurred when Venus, in a letter dated March 19, 2008, notified those customers that its new U.S. affiliate, Venus Stainless, would be taking over the accounts previously handled by AMS.²⁵

²⁰ Petitioners have asked that we reconsider our decision regarding the use of double-bracketed information. For the reasons explained in our June 30, 2009, letter and in Comment 9, we are not relying on that information for these final results.

²¹ See Venus' December 31, 2008, supplemental questionnaire response at 18, which was refiled on January 14, 2009, with corrected bracketing, and Venus' February 4, 2009, supplemental questionnaire response at 1.

²² See Venus' February 2, 2009 (date stamped February 4, 2009), supplemental questionnaire response at 3-4 and Annexure Supplemental Questionnaire Response ("SQR") 3-2.

²³ See Venus' March 16, 2009 (date stamped March 18, 2009), supplemental questionnaire response at 3 and Annexure SQR 7-1.

²⁴ The evidence cited by Petitioners in support of this claim relates to a single sale to a single U.S. customer.

²⁵ See Petitioners' January 21, 2009, submission on AMS at Enclosure 1.

Venus reported that AMS's U.S. customers knew the merchandise was produced by Venus because the test certificate accompanying the shipment bore Venus' name.²⁶ Also, purchase orders from AMS included the name of the U.S. customer because it was necessary to share the customers' technical specifications with Venus, as well as the additional labels/markings that were sometimes required by the end customer.²⁷

Knowledge that Venus was the producer of the merchandise in these sales might provide some indication that AMS was Venus' agent. However, the fact that there was no contact between Venus and AMS's customers in negotiating the sales (see above) or in presale discussions, e.g., regarding technical specifications, supports the conclusion that AMS was not Venus' agent.

3. Means of marketing a product by the producer to the U.S. customer in presale period:

Petitioners claim that AMS clearly marketed the merchandise on behalf of Venus. Petitioners again point to the letter announcing Venus Stainless' taking over of the accounts previously handled by AMS.

As described above, there is no information indicating that Venus played any part in any aspect of the pre-sale process or that AMS was acting on behalf of Venus.²⁸

4. Whether identity of producer on sales documentation inferred such an agency relationship:

While Petitioners cite to two affidavits they submitted to claim that it was well known in the U.S. SSB market that AMS was the U.S. sales agent for Venus, it is not clear how the affidavits support the claim. One affiant states certain information related to AMS. As this information is business proprietary, for further discussion, see the Final Calculation Memo. Petitioners also point to the March 19, 2008, letter terminating AMS's role in marketing Venus' products in the United States, which states that AMS and its employees are no longer "brokers, agents or representatives" for Venus.²⁹

Venus explained its reasons for sending this letter in its February 2, 2009, questionnaire response at 1. Specifically, Venus states because AMS had been servicing its customers for quite a long time using Venus material, those customers may have had the impression that AMS represented Venus in the U.S. market. In the same response, Venus explained that it did not offer material directly to AMS's customers as it would have been competing with itself. Also, according to Venus, over time, customers stopped sending inquiries directly to Venus because they were under the impression that AMS represented Venus in the United States.

Although there is no information from sales documentation that supports an inference of a principal-agent relationship, Venus acknowledges that U.S. customers of AMS may have had

²⁶ See Venus' February 2, 2009 (date stamped February 4, 2009) supplemental questionnaire response at 1-2.

²⁷ See id. at 2.

²⁸ See id.

²⁹ See Petitioners' January 21, 2009, submission on AMS at Enclosure 1.

that impression.³⁰ Accordingly, the Department finds that the March 19, 2008, letter does not establish that a principal-agent relationship existed between Venus and AMS.

5. *Whether the agent/reseller takes title to the merchandise and bears risk of loss:* AMS takes title to the merchandise, although not physical possession.³¹ If the U.S. customer decides not to purchase the merchandise after it has been shipped, AMS bears the loss.³² However, according to Venus' response, if a problem with quality causes the customer to reject the merchandise, Venus is responsible for resolving the matter to AMS's satisfaction.³³

6. *Whether the agent/reseller maintains inventory:* No.³⁴

7. *Whether the agent/reseller further processes or otherwise adds value to the merchandise:* No. AMS is a reseller.³⁵

With regard to the three final criteria, AMS's activities are consistent with those of an independent reseller of the imported merchandise.

Based on the above criteria, the Department finds that the record evidence does not support a finding that there was a principal/agency relationship during the POR between Venus and AMS. Although AMS's U.S. customers may have perceived AMS as representing Venus, the information indicates that Venus was not involved in negotiating the prices paid by AMS's customers or otherwise involved with AMS's customers. In light of this, we disagree with Petitioners that Venus' knowledge of AMS's customers' names or the customers' knowledge that Venus was the producer the merchandise proves that AMS acted as Venus' agent, since these appear to be incidental to the sales process. On balance, the evidence does not support the conclusion that AMS was acting primarily for the benefit of Venus and not for itself.

Comment 3: Alleged Reporting Deficiencies for Venus and Sieves

Petitioners allege that numerous problems exist with the data submitted by Venus and Sieves in this review and that such problems warrant assigning a margin based on AFA. Specifically, Petitioners state that Venus and Sieves submitted responses to the Department that were confusing, contradictory, incomplete, inaccurate, misleading and, at times, false. Thus, even though the companies ultimately provided certain information that was requested, Petitioners contend that consistent with Gerber Food (Yunnan) Co., Ltd v. United States, 491 F. Supp. 2d

³⁰ See Venus' February 2, 2009 (date stamped February 4, 2009) supplemental questionnaire response at 2.

³¹ *Id.* at 2.

³² *Id.* at 3.

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* at 1.

1326, 1336 (“Gerber”), the Department should find that Venus and Sieves impeded the review and failed to cooperate to the best of their ability. To address these failures, the Department should apply an AFA rate of 21.02 percent to Venus and Sieves.

Venus’ and Sieves’ Rebuttal: Venus and Sieves state that they fully cooperated with the Department, and that they did not withhold any information requested by the Department. They claim that, based on their resources and to the best of their ability, they provided all of the information requested by the Department in a complete, accurate, and timely manner. They further note that the total time granted to submit Sieves’ data was insufficient considering the extensive nature of the information sought by the Department.

Department’s Position: Section 776(a)(2) of the Act provides that, if an interested party or any other person: (A) withholds information that has been requested by the administering authority, (B) fails to provide such information by the deadlines for the submission of the information or in the form and manner requested, subject to subsections (c)(1) and (e) of section 782, (C) significantly impedes a proceeding under this title, or (D) provides such information but the information cannot be verified as provided in section 782(i), the administering authority shall, subject to section 782(d), use the facts otherwise available in reaching the applicable determination.

Section 782(d) of the Act provides that if the Department determines that a response to a request for information does not comply with the request, the Department shall promptly inform the person submitting the response of the nature of the deficiency and shall, to the extent practicable, provide that person with an opportunity to remedy or explain the deficiency in light of the time limits established for the completion of the administrative review. Section 782(e) of the Act states that the Department shall not decline to consider information determined to be "deficient" under section 782(d) if all of the following requirements are met: (1) the information is submitted by the established deadline; (2) the information can be verified; (3) the information is not so incomplete that it cannot serve as a reliable basis for reaching the applicable determination; (4) the interested party has demonstrated that it acted to the best of its ability; and (5) the information can be used without undue difficulties.

In addition, section 776(b) of the Act provides that, if the Department finds that an interested party has failed to cooperate by not acting to the best of its ability to comply with a request for information, the Department may use an inference adverse to the interests of that party in selecting from among the facts otherwise available. The Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. 103- 316, Vol. 1 (1994) at 870, reflects the Department’s practice that it may employ an adverse inference "to ensure that the party does not obtain a more favorable result by failing to cooperate to the best of its ability than if it had cooperated fully." It also instructs the Department to consider, in employing adverse inferences, "the extent to which a party may benefit from its own lack of cooperation." *Id.*

In order to apply AFA, the Department must find, *inter alia*, that the respondent has failed to cooperate by not acting to the best of its ability to comply with a request for information. Petitioners are correct that this standard can be met where respondents withhold requested information until the late stages of the questionnaire process, thereby impeding the review. *See*

Gerber. However, we do not find that Venus and Sieves failed to cooperate by not acting to the best of its ability in this case.

On March 6, 2009, the Department published its Preliminary Results and preliminarily collapsed Venus and Sieves. A questionnaire was sent to Sieves at that time to further develop the record with respect to the relationship between Venus and Sieves, and to solicit information on the types of products sold by Sieves in the home market. Based on our review of Sieves' April 4, 2009, response, we determined on April 30, 2009, that it was appropriate for Sieves to provide a response to the full questionnaire. Moreover, given that the fully extended deadline for these final results was in early September, we decided that we would have to cut off the questionnaire/response period in early July. Only by doing this were the Department and Petitioners given adequate time to analyze Sieves' responses. The drawback of this cutoff date was that only two and a half months were allotted to send questionnaires and supplemental questionnaires and to receive responses from Sieves regarding its home market sales and its cost of production. We note that during this short period of time, Sieves responded to the Department's full questionnaire, three sales supplemental questionnaires and two cost supplemental questionnaires. On this basis, we have determined that Sieves did not withhold or fail to provide information or impede the Department's investigation. In fact, normally, a respondent would have several additional months to respond to this many supplemental questionnaires. Thus, given the extent of Sieves' responses to the Department's questionnaires and the limited time available to Sieves to file these responses, we do not find that Sieves failed to act to the best of its ability.

As explained below in the comments regarding specific alleged reporting deficiencies, Petitioners have identified certain areas of Sieves' responses where the Department could have requested more information. However, the time to do so simply did not exist in this review. Moreover, we find that the failures alleged by Petitioners do not impede the Department from calculating an antidumping margin for the collapsed companies as we have the information necessary to make these calculations. We acknowledge that by including Sieves' home market sales and cost data in our antidumping calculations, we learned that Venus should have identified an additional affiliated party, Hitech Industrial Corporation ("Hitech") and that the activities of other affiliates, Venus Metal Corporation ("Venus Metal") and Bahubali Steel Industries ("Bahubali"), should have been more fully reported. While it is important to identify all affiliates involved in the production and sale of the subject merchandise, we note that none of these companies' activities pertained to Venus' production or sales, and Venus has provided explanations of why it reported as it did. Additionally, while certain minor information related to Sieves' sales expenses and cost are lacking, we did not request Sieves to remedy or explain this deficiency pursuant to section 782(d) of the Act because such a request would have been impractical given the deadline for completing this review. Rather, given the tight deadlines in this proceeding, which are explained above, we conclude that Sieves did not fail to act to the best of its ability by responding to all of the Department's questionnaires and did not impede or withhold information. Thus, we do not agree that the minor deficiencies provide a basis for finding that Venus and Sieves impeded the review or failed to act to the best of their ability. Therefore, we are not basing the final margin on AFA.

We address these alleged data problems individually below.

Comment 3a: Bahubali's and Venus Metal's Involvement in the Production/Sale of Stainless Steel Bar

Petitioners' Argument: According to Petitioners, in Sieves' June 8, 2009, Section A response, Sieves stated that it was affiliated with Hindustan Stainless ("Hindustan"), Venus Metal, and Hitech³⁶ but did not report Bahubali as an affiliated party, despite Venus reporting Bahubali as an affiliate. Petitioners argue that Sieves and Bahubali are affiliated and that central to the Department's dumping investigation is the identity of all affiliated parties and any affiliate's involvement with the merchandise subject to the review.³⁷ Petitioners also contend that without proper and full identification of the respondent's affiliated parties, the Department cannot develop a complete and accurate record and, therefore, cannot calculate an accurate dumping margin.

Importantly, Petitioners claim, Sieves and Venus did not timely report that Bahubali purchased stainless steel bar ("SSB") from Sieves. Specifically, in its February 6, 2009, supplemental questionnaire response, Venus reported Bahubali's suppliers of SSB and did not include Sieves among them. Moreover, Sieves first reported home market sales to Bahubali in its June 8, 2009, home market sales database and in that database incorrectly classified Bahubali as an unaffiliated customer.³⁸ While the Department subsequently directed Sieves to report the "downstream" sales of its merchandise by Bahubali, Petitioners argue that this delay hindered the Department's review. Moreover, Petitioners contend, the Department is missing critical information from the downstream reseller, Bahubali, including reconciliations, levels of trade analysis, and warehousing expenses. Petitioners contend that had Venus and Sieves identified this affiliated reseller earlier in the proceeding, the Department would have had the time to gather this necessary information.

Similarly, Petitioners contend that Venus and Sieves failed to report the role of their affiliate Venus Metal in the production/sale of SSB. As with the suppliers of Bahubali, Venus did not report Sieves as a supplier of Venus Metal.³⁹ Although Venus Metal's downstream sales were reported (in response to the Department's request), Petitioners contend that the types of information that are missing for Bahubali are also lacking for Venus Metal's sales. Further, Petitioners claim that Venus Metal's financial statements demonstrate that it is involved in certain activities beyond being a trading company.

A further consequence of the missing information about Bahubali's and Venus Metal's activities, Petitioners claim, is that Sieves failed to report its total cost of production. Citing, *inter alia*,

³⁶ Sieves' June 8, 2009 AQR at 7.

³⁷ See Uncovered Innerspring Units From the People's Republic of China: Final Determination of Sales at Less Than Fair Value, 73 FR 79443 (December 29, 2008) and accompanying Issues and Decision Memorandum at 3-6 (Comment 1).

³⁸ Sieves' June 8, 2009 A Questionnaire Response at 2, 7, 10, 12, 13, and 19.

³⁹ Venus' February 6, 2009 Supp D questionnaire response at 1.

Notice of Final Determination of Sales at Less Than Fair Value; Certain Cold-Rolled Carbon Steel Flat Products From France, 67 FR 62114 (October 3, 2002) (“Cold-Rolled Steel from France”) and accompanying Issues and Decision Memorandum at Comment 3, Petitioners claim that the Department requires all expenses incurred prior to the final sale by the downstream affiliated resellers to be included in the cost of production. Thus, Sieves’ cost of production cannot be adjusted upwards for Bahubali’s and Venus Metal’s presale expenses, movement expenses, warehousing expenses, selling, general, and administrative expenses, inventory carrying costs and other finance expenses.

Venus’ and Sieves’ Rebuttal: Venus and Sieves assert that Sieves did not fail to report Bahubali as an affiliated party in its Section A response, as they contend that Sieves is not affiliated with Bahubali because there is no operational control between the two companies. Venus and Sieves cite section 771(33) of the Act and 19 CFR 351.102, claiming that operational control must exist between two companies in order for them to be considered affiliates, even if the owners are from the same family.

Next, Venus and Sieves claim Venus did not report that Bahubali purchased SSB from Sieves because of a product misclassification. Specifically, they cite to Bahubali’s purchase report, which they say showed that Sieves purchased stainless steel rods, not bars, from Sieves during the POR. Venus and Sieves claim that only after Sieves’ sales data were analyzed did it show that Bahubali had purchased SSB and not stainless steel rods.

Finally, Venus and Sieves assert that Sieves’ sale of SSB to Venus Metal was in March 2008, which was outside the POR. Thus, Venus did not fail to report that Venus Metal had purchased SSB from Sieves.

Department’s Position: Although Venus and Sieves do not agree that “affiliation” as defined in section 771(33) of the Act can be based on familial relationships and control, the Department had preliminarily explained its position on this issue in its Collapsing Memo, which was issued prior to issuing Sieves a full questionnaire. Thus, even if it wished to register its disagreement with the Department’s position, Sieves was on notice that it should have identified Bahubali as an affiliated party in its Section A response.⁴⁰

Nonetheless, according to 19 CFR 351.403(d), we normally will not calculate normal value based on sales by an affiliated party if the sales of the foreign like product by an exporter or producer to affiliated parties account for less than five percent of the total value (or quantity) of the exporter or producer’s home market sales. In this case, consistent with China Steel Corp. v United States, 306 F. Supp. 2d 1291, 1299-1301 (CIT 2004), we combined the affiliated home market sales of Venus and Sieves and divided this sales figure by the total home market sales of Venus and Sieves and, whether by value or quantity, Venus’ and Sieves’ sales to their affiliated parties do not meet the five percent threshold.⁴¹ Consequently, where they pass the arm’s length

⁴⁰ For these final results, we determine that Venus, Sieves and Bahubali are affiliated based on record information from Venus’ ownership and board of directors chart. As this information is business proprietary, see Venus’ January 27, 2009, supplemental questionnaire response and the Final Calculation Memo.

⁴¹ Because these percentages are business proprietary information, see Final Calculation Memo.

test (see 19 CFR 351.403(c)), we are using Sieves' sales to its affiliated parties for our final results. Because we are not relying on any sales by the affiliated parties, Petitioners' comments regarding missing information about these sales are moot.

Regarding Venus' alleged failure to report that Bahubali made sales of SSB produced by Sieves during the POR, it is clear from Sieves' responses that such sales were made. However, Venus has explained that it did not report Sieves as a supplier of Bahubali because Bahubali's records listed its purchases from Sieves as being rod rather than bars. We have no basis to dispute this and, moreover, for the reasons explained above, these sales by Bahubali are not being used in our analysis.

Regarding Venus' alleged failure to report that Sieves supplied SSB to Venus Metal, we agree with Venus and Sieves that Sieves' sale to Venus Metal fell outside the POR. Specifically, the Department asked Venus to provide the quantity and value, by each producer, of SSB sold by Venus Metal (and Bahubali) during the POR, which is from February 1, 2007, to January 31, 2008. In Venus' February 6, 2009, submission (date stamped February 10, 2009), Venus provided this information. Because Venus Metal's SSB purchases from Sieves were in March 2008, which is outside of the POR, Venus properly did not report this information in its February 10, 2009, questionnaire response. The Department notes that these March 2008, sales were reported in Sieves' home market sales database because March 2008, is within the sales window reporting period (three months prior and two month after the POR).

Finally, with regard to Petitioners' claim that Sieves' cost of production is understated because it does not include various expenses incurred by Bahubali and Venus Metal, we disagree. In the cases cited by Petitioners, including Cold-Rolled Steel from France, the Department included these costs when the downstream seller also undertook certain manufacturing or finishing activities. In this review, Petitioners have alleged that Venus Metal's financial statements show that it is more than a "trader," but based on our examination of those financial statements, we disagree. Instead, we conclude, based on a thorough review of Bahubali and Venus Metal's financial statements,⁴² that Bahubali and Venus Metal are simply resellers of SSB (and other products) and, consequently, that their costs are properly not included in Sieves' cost of production.

Comment 3b: Hindustan's Involvement in the Production/Sale of Stainless Steel Bar

Petitioners' Argument: Petitioners assert that both Venus and Sieves submitted false and conflicting statements about whether affiliate Hindustan produced and sold SSB. Petitioners contend that this contradictory information resulted in Venus and Sieves failing to notify the Department in a timely manner of Hindustan's involvement in Sieves' home market sales and, as a result, the Department was unable to request the information necessary for this review.

After several conflicting statements regarding Hindustan's role in producing and/or selling SSB, Sieves reported in its July 2, 2009, supplemental questionnaire response that Hindustan solicited

⁴² As this information is business proprietary, see Final Calculation Memo, for further discussion.

business on behalf of Sieves and executed orders from Sieves.⁴³ Petitioners contend that, based on this statement, Hindustan played a role in Sieves home market sales of merchandise subject to this review. Petitioners note that neither Sieves nor Venus has provided any credible explanation of why they misled the Department with their earlier statements that Hindustan was not involved in home market sales.

Petitioners claim that Sieves failed to report the selling expenses associated with Hindustan's sales of SSB. In addition, Petitioners argue that Hindustan should have also reported such information as its quantity and value figures, accounting and financial practices, and a description of its sales process. Petitioners contend that the Department cannot fill in the information gaps using only Hindustan's financial statements because it does not know the ratio of direct and indirect home market selling expenses relative to Hindustan's selling expenses in other markets. Also, Petitioners argue that the Department does not have Hindustan's general and administrative expenses and finance expenses, which would need to be added to Hindustan's cost of production, including loans and other transactions with affiliates. Petitioners conclude that the Department is unable to fill significant gaps in Sieves' data due to significant omissions in the responses and must assign AFA to Sieves and Venus.

In addition, Petitioners claim that record evidence shows Sieves, Hindustan and Venus Metal have the same administrative location in Mumbai and that Sieves and Hindustan share the same location for their manufacturing facilities in Maharashtra.⁴⁴ Petitioners also cite an article from Stainless India, which notes that Hindustan has "state-of-the-art manufacturing facilities" for producing SSB.⁴⁵ They also cite information in Hindustan's March 31, 2006, financial statements regarding the acquisition of new plant and equipment as supporting the article's reference to Hindustan's new manufacturing facilities. Also, Sieves' March 31, 2008, financial statements, according to Petitioners, demonstrate that Sieves had transactions with Hindustan. Petitioners point to one of Sieves' statements⁴⁶ as indicating that Hindustan was involved in the production of SSB during the POR, and dispute Sieves' statement that the manufacturing facility described in the Stainless India article was for the Sieves facility.

Petitioners contend that, based on the above evidence, Petitioners assert the Department should reject Sieves' data as unreliable and should find Sieves uncooperative in this proceeding. Also, there are significant data gaps which the Department cannot fill and, therefore, Sieves and Venus must be assigned AFA.

Venus' and Sieves' Rebuttal: Venus and Sieves respond that Hindustan neither produced nor sold SSB during the POR and that its activities were clearly explained in Sieves' July 2, 2009,

⁴³ See Sieves' July 2, 2009, Supp. AQR at 3-4.

⁴⁴ See Petitioners' June 25, 2009, Letter at 8.

⁴⁵ See the Department's June 18, 2009, Letter at 2 citing Stainless India.

⁴⁶ Citing Sieves' July 2, 2009 Supp. AQR at 3, petitioners refer to Sieves' statement, "...during the POR, Hindustan didn't produce any materials by themselves."

questionnaire response.⁴⁷ Venus and Sieves state that Hindustan's financial statements do not show any evidence that Hindustan produced SSB, as consumable accounts, like electricity and wages, are not reflective of SSB production. Since Hindustan did not produce SSB during the POR, there are no costs to report to the Department.

Sieves claims it has fully cooperated with the Department's request for information, and has provided this information under tight deadlines as Sieves was only given two months to respond to all sections of the Department's questionnaire and supplemental questionnaires.

Department's Position: We agree with Venus and Sieves that the evidence indicates that Hindustan did not produce SSB during the POR. We have examined Hindustan's March 31, 2008, financial statements and in the notes section, it states: "The firm is setting up the project for manufacture of SS Wire and SS Bright Bars."⁴⁸ We also examined the consumable accounts, like electricity and wages, and these accounts are not reflective of SSB production.⁴⁹ Additionally, Venus and Sieves explained in their July 2, 2009, response that the facility mentioned in the Stainless India article is Sieves' facility and that Hindustan's facility opened in March 2009, which is after the POR. Based on the above evidence, we determine that Hindustan does not have any production costs to report.

However, based on Sieves' statement that Hindustan solicited and executed orders on behalf of Sieves, we agree with Petitioners that Hindustan incurred selling expenses which should have been reported by Sieves. After examining Hindustan's financial statements, we cannot determine which expenses are related to its services of soliciting and executing orders for Sieves for Sieves' home market sales. For the reasons explained above, we did not have sufficient time to request this information from Sieves. Therefore, we are not making an adjustment to Sieves' selling expenses at this time but we intend to examine this issue further in the next review.

Comment 3c: Hitech's Involvement in the Production/Sale of Stainless Steel Bar

Petitioners' Argument: Petitioners claim that Venus and Sieves withheld information regarding Hitech. Petitioners further claim that Hitech and "Hitech Engineering" are the same entity, and that the owners of Sieves also own Hitech.

Petitioners state that they were not aware that Hitech was affiliated with Venus and Sieves until Sieves filed its Section A questionnaire response because Venus had not reported Hitech as an affiliated entity.⁵⁰ Additionally, in Sieves' Section A response, Sieves reported that Hitech had

⁴⁷ See Sieves' July 2, 2009, Supp. AQR.

⁴⁸ See Venus' October 24, 2008, questionnaire response, Annexure SQR A-15 at 8, under Schedule – 11, 2. Fixed Assets.

⁴⁹ As this information is business proprietary, see Final Calculation Memo.

⁵⁰ Sieves' June 8, 2009 AQR at 7; Department's September 26, 2008 Supp. Questionnaire; Department's January 16, 2009 Supp. Questionnaire; Venus' October 24, 2008 Supp. AQR at 6.

no activity⁵¹ but then, in a later submission, stated that Sieves paid rent to Hitech for an office building.⁵² Petitioners argue that the financial statements of Bahubali, Sieves, and another affiliated company affirm that there were transactions between Hitech and these affiliated companies, and that this contradicts Sieves' statements that Hitech had no activities except for renting space to Sieves.⁵³

Finally, Petitioners claim that the Department cannot assess Hitech's activities as Sieves did not submit Hitech's financial statements; nor can it determine whether the rental transaction between Sieves and Hitech was at arm's length. Therefore, an accurate dumping margin cannot be calculated.

Venus' and Sieves' Rebuttal: Venus and Sieves affirm that Hitech and Sieves have the same owners. They state that Sieves did not report Hitech in its submissions to the Department because Hitech had no activity during the past several years. They further point to the fact that this was the first time that Sieves had participated in the Department's antidumping review and that Sieves reported information to the Department as interpreted by Sieves' in its "normal business practice."

Venus and Sieves dispute Petitioners' statement that Hitech is also known as Hitech Engineering. Venus and Sieves state that Hitech and Hitech Engineering are two different companies and that Sieves is not affiliated with Hitech Engineering. Finally, Venus and Sieves claim that Venus was not aware of Hitech's existence because Hitech was not an operating company.

Department's Position: We disagree with Petitioners that Hitech and Hitech Engineering are the same company or that Sieves is affiliated with Hitech Engineering. Petitioners have not provided any evidence or support for their statement that Hitech is "also believed to be Hitech Engineering."⁵⁴ Moreover, upon review of the financial statements of Bahubali, Sieves, and the other affiliated company named by Petitioners, we determine that, aside from the rent Sieves paid Hitech, these affiliated companies had no transactions with Hitech.⁵⁵ Thus, there is no evidence showing that Hitech had any sales or manufacturing operations during the POR.

With respect to the rent paid to Hitech, we agree with Petitioners that we were not able to examine whether the transaction was at arm's length. As explained above, time constraints in this review prevented us from requesting additional information on this issue. Therefore, we are

⁵¹ Sieves' June 8, 2009 AQR at 7.

⁵² Sieves' July 2, 2009 Supp. AQR at 2.

⁵³ Venus' October 24, 2009 Supp. AQR at Annexure SQR A-10; Sieves' June 8, 2009 AQR at Attachment A-4; Sieves' July 2, 2009 Supp. AQR at 2; Sieves' July 10, 2009 Supp. A, B, D Questionnaire Response at Annexure SQR-15; Venus' October 24, 2008 at Annexure SQR(A)-13.

⁵⁴ See Petitioners' Case Brief at 35.

⁵⁵ As this information is business proprietary, see Final Calculation Memo.

not making an adjustment to Sieves' cost expenses at this time but we intend to examine this issue further in the next review.

With respect to Venus' alleged failure to report affiliate Hitech's role in the production and sale of merchandise under review, we agree with Petitioners that this information should have been reported. However, we do not see Venus' failure as rising to the level of significantly impeding our investigation as these costs are already included in Sieves' cost of production and, as explained above, we were only unable to examine whether the transaction was at arm's length.

Comment 3d: Affiliated Party Loans

Petitioners' Argument: Petitioners claim that Sieves failed to disclose that the loans from certain of its affiliated parties did not reflect arm's length terms. According to Petitioners, this creates two problems. First, Sieves would have relied on these loans to calculate its short-term interest rate for as part of its home market selling expenses. Second, Petitioners conclude that the Department cannot rely on Sieves's submitted financial expense ratio because it does not reflect arm's length financial expenses.

Venus and Sieves did not comment on this issue.

Department position: We agree with Petitioners that the loans Sieves received from its affiliates were not arm's length transactions. Section 773(f)(2) of the Act explains that transactions between affiliated persons may be disregarded if that amount does not fairly reflect the amount usually reflected in sales of the merchandise under consideration in the market under consideration. In the instant case, we compared the interest rates charged by Sieves's affiliates to the rate charged on market-based loans. Because the interest rates paid by Sieves to its affiliates were at less than the market rate, we adjusted Sieves's interest expense to reflect arm's length amounts.⁵⁶

Regarding the interest rate used for Sieves' imputed credit calculation, Sieves did not rely on the loans from affiliates. Instead, Sieves used the same rate reported by Venus, which the Department finds to be reliable.

Comment 3e: Affiliated Party Transactions

Petitioners' Argument: Petitioners argue that Sieves failed to report the COP data for major inputs that Sieves purchased from an affiliated party. Petitioners continue that because of this failure, the Department is unable to determine the proper valuation of these affiliated party purchases and it is unable to determine an accurate COP for Sieves.

Venus and Sieves did not comment on this issue.

⁵⁶ See Memorandum to Neal M. Halper from Gary Urso, Cost of Production and Constructed Value Adjustments for the Final Results – Venus Wire Industries Pvt., Ltd., dated September 2, 2009 (“Final Results COP Calculation Memorandum”).

Department's position: We disagree with Petitioners that the costs for certain inputs Sieves purchased from an affiliated party qualify as major inputs. To determine if an input is major and whether section 773(f)(3) of the Act would apply, the Department typically reviews the percentage of the input received from the affiliated company relative to total purchases of the input and the percentage that input represents to the total cost of manufacturing ("TOTCOM"). See, e.g., Preamble, 62 FR at 27362. In the current case, Sieves submitted charts which provided the quantities and values of inputs purchased from affiliated suppliers. See Sieves' June 15, 2009, supplemental Section D response at IIA7. We reviewed the percentage of the input received from the affiliate relative to the total purchases of the input and the percent the total input represents of TOTCOM and noted that the purchases from the affiliate comprised a very small percentage of Sieves' POR purchases of the input and TOTCOM. Because the purchases from the affiliate were so small, we did not apply the major input rule, section 773(f)(3) of the Act. Instead we subjected the input to the transactions disregarded rule in accordance with section 773(f)(2) of the Act. See Final Results COP Calculation Memorandum.

As set forth in section 773(f)(2) of the Act, transactions, directly or indirectly, between affiliated persons may be disregarded if, in the case of any element of value required to be considered, the amount representing that element does not fairly reflect the amount usually reflected in sales of merchandise under consideration in the market under consideration. Therefore, we compared the average transfer price for the input to the average purchase price from non-affiliates. This comparison showed that the transfer price was less than an average market price. Based on the results of our analysis, we adjusted the transfer price for the affiliated inputs to reflect arm's-length amounts. See Final Results COP Calculation Memorandum.

Comment 4: Whether Respondents' Failed to Follow the Procedural Requirements of the Department's Regulations

Petitioners' Argument: Petitioners claim that the significant procedural irregularities have impeded the Department's ability to review and analyze Venus' and Sieves' responses. Petitioners state that Venus and Sieves collectively made over 30 extension requests, and that most of them were not timely or properly filed. Specifically, Petitioners claim that some of the extension requests were filed after the due dates for the questionnaire responses, or that Venus and Sieves filed partial responses, and made informal requests to submit the remainder of the requested information after the due date. Petitioners note that although the extension requests were made improperly by the respondents, the Department, in many cases, granted them. This occurred despite Petitioners' objections to the multiple extensions.

Petitioners also claim that the respondents were permitted to submit their responses electronically and subsequently follow up with the hard copy responses at a later date. Petitioners contend that this put them at a disadvantage because the electronic copies were not made available to them and, consequently, they had too little time to submit deficiency comments. Additionally, Petitioners claim that, on June 29, 2009, the Department told them that they could not submit any Section D deficiency comments because the Department did not have time to consider them.

Petitioners claim that these procedural irregularities further support the application of AFA to Venus and Sieves.

Venus' and Sieves' Rebuttal: Venus and Sieves contend that they provided all the information requested by the Department in a complete, timely and accurate manner. Additionally, they claim that the current regulations and precedence allow the Department, at the Department's discretion, to grant time extensions if requested to do so. Venus and Sieves state that they made requests for time extensions because of the geographical distance between the United States and India. Furthermore, they allege that the total amount of time that the Department granted Sieves to submit its data was insufficient. Therefore, Sieves had to rely on electronic transmissions followed by hard copies. Venus and Sieves cited to one instance in which Sieves submitted its response before the due date.⁵⁷ They also state that they are at a disadvantage to local U.S. companies because of administrative and logistical delays that can occur between India and the United States. Venus and Sieves cited examples such as custom clearance delays, flight delays and routing problems.

Department's Position: We agree that Venus failed to submit its extension requests properly, in some instances, and that we, nonetheless, granted the extensions. We also acknowledge that we accepted electronic responses for Sieves. This was necessitated, in part, by our decision relatively late in the review to issue a full questionnaire and several supplemental questionnaires to Sieves. The facts regarding the timing of Sieves questionnaires are explained in detail in the Department's position for Comment 3.

We disagree that Petitioners were unfairly prejudiced by these actions. During this proceeding, Petitioners have submitted 17 deficiency or rebuttal comments regarding Venus and Sieves, which is an extensive number of filings. In response, the Department has given due consideration to these comments by issuing numerous supplemental questionnaires, with many questions asked specifically at the request of Petitioners to clarify the record. When the Department issued Sieves a full questionnaire on April 30, 2009, Sieves provided its sections A, B, and C responses on June 11, 2009, and its section D response on June 18, 2009. On June 18, 2009, we issued our first sales supplemental questionnaire and Sieves responded on July 7, 2009. On June 25, 2009, Petitioners submitted 99 pages of deficiency comments on sections A and B. The Department considered these comments when it issued its second section A/B supplemental questionnaire to Sieves on June 29, 2009 and Sieves responded on July 7, 2009. Then, on June 24, 2009, the Department issued its first cost supplemental questionnaire and Sieves responded on July 14, 2009. On July 6, the Department issued its third questionnaire and Sieves responded on July 14, 2009. Also, on July 9, 2009, the Department issued its second cost supplemental questionnaire and Sieves responded on July 15, 2009. On July 23, 2009, Sieves filed its cost reconciliation. The case briefs were due on August 3, 2009. We note that when Sieves filed its questionnaire responses, regardless of whether an extension was granted, Petitioners had an opportunity to file comments. Therefore, Petitioners had ample time to file any comments, including section D comments, to the Department as Petitioners were served with Sieves' section D questionnaire on June 18, 2009. Regarding Petitioners argument that the Department told Petitioners that they could not file any additional comments, the Department was referring to

⁵⁷ See Sieves' submission July 7, 2009.

additional comments for the section D supplemental questionnaire, as that supplemental questionnaire was issued several days earlier, on June 24, 2009. However, shortly after this conversation referred to in Petitioners' case brief, the Department invited Petitioners to file comments on Sieves.

Comment 5: Venus' Request to Revise Its U.S. Sales Database to Reflect a Billing Adjustment

Petitioners' Argument: Petitioners argue that the Department should reject Venus' request to revise its U.S. sales database to reflect billing adjustments.⁵⁸ Petitioners contend that record evidence raises serious concerns about the authenticity of the submitted billing adjustment and the overall accuracy of the U.S. sales database. Petitioners' comments on the record evidence are business proprietary in nature and, thus, are detailed in the Final Calculation Memo.

Petitioners further claim that Venus' excuse for not timely disclosing the billing error is not supported by the record. Petitioners argue that Venus has not explained why it did not notify the Department of this billing adjustment in prior submissions. According to Petitioners, Venus made 18 separate filings in response to the Department's requests for information and at no time during these filings did Venus mention the existence of the purported U.S. billing error. Petitioners claim that Venus has not offered any reason to the Department as to why it did not raise the U.S. billing error at any time during the development of the record. Moreover, Petitioners point out that Venus confirmed to the Department that it had no U.S. billing adjustments and removed the reported field from the U.S. sales database in a supplemental questionnaire response.⁵⁹

Venus' and Sieves' Rebuttal: Venus dismisses Petitioners' claims. Contrary to Petitioners' claims, Venus argues that its request is legitimate and, therefore, should be allowed. Venus contends that the billing error occurred on one invoice and was found during a routine internal audit. Venus states that it voluntarily reported the error to the Department⁶⁰ and responded to all of the Department's requests for documentation to support its claim.⁶¹ Furthermore, according to Venus, documentation it submitted in support of the billing adjustment confirms that the billing adjustment is legitimate.⁶² Venus' comments on the record evidence are business proprietary in nature and, thus, are detailed in the Final Calculation Memo.

⁵⁸ See Venus' March 24, 2009, letter requesting that the Department allow it to submit a revised U.S. sales database to reflect certain "invoice revisions."

⁵⁹ See Venus' December 6, 2008, supplemental questionnaire response at 22.

⁶⁰ See Venus' March 24, 2009, letter.

⁶¹ See Venus' April 8, 2009, submission and Venus' May 8, 2009, supplemental questionnaire response ("May 8 SQR").

⁶² See Venus' May 8 SQR at Annexure 1 and 2.

Venus also points out that it reported the billing adjustment and the correct gross unit price in its response to the Department's original questionnaire. However, due to the aforementioned accounting error, subsequent filings of the U.S. sales database did not contain this information.

Department's Position: Consistent with administrative and judicial precedent,⁶³ we agree with Venus that the billing adjustments should be allowed. In making its request for correction, Venus notified the Department after the Preliminary Results that due to an inadvertent billing error, the gross unit price of certain sales observations in its U.S. sales database was misreported and Venus supplied supporting documentation.⁶⁴ The Department requested further supporting documentation.⁶⁵ After reviewing all of the information submitted by Venus, we determine that the record evidence supports Venus' claim. Therefore, we are including the proposed billing adjustments to Venus' U.S. sales database in our calculations for the final results.

We disagree with Petitioners' assertion that that record evidence raises serious concerns about the authenticity of the submitted billing adjustments and the overall accuracy of the U.S. sales database. Venus supported the billing adjustments with thorough documentation including relevant invoices, purchase orders, order confirmations, e-mail communications with its U.S. customer notifying it of the billing errors, bank documentation and shipment documentation.⁶⁶ Moreover, Venus supplied an e-mail from the U.S. customer acknowledging the billing adjustment. Given the small number of billing adjustments relative to the number of sales observations in the U.S. sales database, we do not agree with Petitioners that the overall accuracy of the U.S. sales database is in question.

We also disagree with Petitioners' contention that Venus' excuse for not timely disclosing the billing error is not supported by the record. Venus did, in fact, report the billing adjustments in a timely manner when it submitted its U.S. sales database in response to the Department's original questionnaire, but due to an accountant's error, omitted the adjustments in subsequent submissions to the Department. After the Preliminary Results, Venus notified the Department of the adjustments due to an inadvertent accounting error found during an end-of-the year audit.⁶⁷

We note further that Venus submitted its original request to the Department 129 days before the start of the briefing schedule and Petitioners commented on the request in their case brief. Venus' additional information was submitted 117 days before the final results deadline, thus

⁶³ Timken U.S. Corp. v. United States, 434 F.3d 1345 (Federal Circuit 2006) ("Timken"). See also, Notice of Final Results of Antidumping Duty Administrative Review, and Final Determination to Revoke the Order In Part: Individually Quick Frozen Red Raspberries from Chile, 72 FR 6524 (February 12, 2007) and accompanying Issues and Decision Memorandum at Comment 15 (where the Department accepted a correction to a respondent's sales database seventy days before the final results affording petitioners sufficient time to comment).

⁶⁴ See Venus' March 24, 2009, letter.

⁶⁵ See Venus' April 8, 2009, submission.

⁶⁶ See Venus' March 24, 2009, submission and Venus' May 8, 2009, submission.

⁶⁷ Id.

affording Petitioners with sufficient time to comment. After analysis of the record information, we are satisfied with Venus' explanation.

Comment 6: Comparison of Certain Similar Merchandise Sold in the Home Market

Venus' Argument: Venus argues that the Department's comparison of merchandise sold in the United States with certain merchandise sold in the Indian market was not in compliance with 771(16) of the Act or Import Administration Policy Bulletin 92.2, "Differences in Merchandise; 20% Rule," dated July 29, 1992. Specifically, Venus disagrees with the Department's comparison of U.S. sales of grade 630 with home market sales of grades 303, 304 and 304L. Venus argues that these products are completely different in chemistry, physical properties, usages, commercial value and production methods. Moreover, Venus asserts that the Department cannot apply the "rule of thumb" 20 percent cost difference in this case since the cost differences between these grades are not reflective of the physical properties of the compared products.

Petitioners' Rebuttal: Petitioners argue that the Department's calculation of the difference in merchandise adjustment in the Preliminary Results was in accordance with the dumping statute, the Department's regulations and the Department's policy. Citing section 771(16)(C) of the Act, Petitioners argue that Venus' argument should be rejected by the Department because grades 630, 303, 304 and 304L were all produced in India by Venus and each of these grades is, at a minimum, in the same general class or kind of the merchandise that is subject to this review. Thus, according to Petitioners, the Department's decision to compare grade 630 with grades 303, 304 and 304L is in compliance with the statute. Petitioners further argue that the Department made the requisite adjustment to the normal value to account for these differences, pursuant to section 773(a)(6)(C)(ii) of the Act. Finally, Petitioners assert that the Department followed the 20 percent rule articulated in Policy Bulletin 92.2.

Department's Position: Section 771(16) of the Act directs the Department to select for comparison purposes, in descending order of reference, the foreign-like product: identical in physical characteristics with the subject merchandise, similar in physical characteristics and commercial value, or of the same general class or kind that can reasonably be compared. Furthermore, section 773(a)(6)(C)(ii) of the Act directs the Department to make a reasonable allowance for differences in merchandise, if the Department compares the U.S. merchandise to similar merchandise sold in the foreign market. Finally, it is the Department's practice to compare physically similar products as long as the difference in the variable costs between the two similar products do not exceed 20 percent.^{68,69}

Venus reported that it manufactures grades 630, 303, 304, and 304L at its plant in India.⁷⁰ Thus, the grades in question are produced in the same country and by the same person. Moreover, all

⁶⁸ See Import Administration Policy Bulletin 92.2, "Differences in Merchandise; 20% Rule," dated July 29, 1992.

⁶⁹ See Electrolytic Manganese Dioxide From Greece: Preliminary Results of Antidumping Duty Administrative Review, 65 FR 26567, 26568 (May 8, 2000).

⁷⁰ See Venus' July 7, 2008, Section D response.

of these grades are within the class or kind of merchandise covered by the order. Although Venus argues that grade 630 is dissimilar in several respects from the 300 grades, we determine that the products can be reasonably compared. With the exception of prime and non-prime stainless steel products, we are not aware of, and Venus has not pointed to, any instances in which the Department has found stainless products within a class or kind of merchandise non-comparable. The alleged differences between grade 630 and the 300 grade SSB may indicate that there is a better match in the home market for the grade 630 sold in the United States, but Venus has not identified what the better match might be and whether it would be permissible match under our matching methodology.

Accordingly, we have continued to compare grade 630 to grades 303, 304 and 304L for these final results. Furthermore, as noted in the preliminary results calculations, the Department made the requisite adjustment to the normal value to account for differences in merchandise, as required under section 773(a)(6)(C)(ii) of the Act. Consistent with our policy, the difference in merchandise adjustment was less than 20 percent of the total average cost of production, on a model specific basis, of the products exported to the United States. Therefore, the Department appropriately followed the “20 percent practice” as explained in Policy Bulletin 92.2 in the Preliminary Results.

Comment 7: Whether Certain Home Market Sales are Outside the Ordinary Course of Trade and Whether the Department Should Make a Level of Trade Adjustment

Venus’ Affirmative Comments: Venus argues that certain of its home market sales are outside the ordinary course of trade and should not be compared to its sales in the United States. According to Venus, the volume of these home market sales was much lower than the volume of the U.S. sales to which they were compared. Moreover, Venus argues that these home market sales were made at a different level of trade than the U.S. sales to which they were being compared: the home market customers were original equipment manufacturers and the U.S. market customers were “stockiest” and distributors.⁷¹ Venus further distinguishes the home market and U.S. sales because they are made from different grades of stainless steel which, in Venus’ view, are not comparable. Finally, Venus contends that the products sold in the home market have a smaller diameter than SSB to which it was being compared in the United States.

In conclusion, Venus states that because of its small size, the different level of trade and the small quantity, the prices of the home market transactions are significantly higher than the regular price in the home market and, hence, the sales in question should be found outside the ordinary course of trade. Venus requests that the Department use constructed value or another home market sale consisting of the same grade and quantity for comparison to U.S. sales for Venus’ margin calculations.

Petitioners’ Rebuttal: Petitioners contend the Department should reject Venus’ request for a level of trade adjustment because the record does not support Venus’ claim.

⁷¹ See Venus’ Case Brief at 6-7.

Petitioners contend that Venus' argument does not focus on any of the different selling functions required for a level of trade adjustment and its argument is results-oriented. Throughout Venus' submissions, Venus confirmed that it used the same channel of trade in both the U.S. and home markets, and that all of its U.S. and home market sales were made at the same level of trade.⁷² Further, Venus submitted a selling function chart to the Department, in which it reported identical selling functions to both the U.S. and home markets.⁷³ Since the record indicates that there are no differences in the channels or levels of trade for its U.S. and home market sales, Petitioners assert that there is no basis to determine that there is a difference in level of trade at this point in the review.

Moreover, Petitioners claim that the Department should reject Venus' claims for a level of trade adjustment because Sieves provided incomplete and misleading information concerning the selling functions of downstream resellers⁷⁴ and, hence, Venus and Sieves failed to cooperate with the Department to the best of their ability. Therefore, Petitioners assert that not only should Venus' claim for a level of trade adjustment be rejected, but the failure of the respondents to provide complete and accurate information warrants the application of AFA.

Department's Position: Venus has advanced several lines of argument in contending that certain of its U.S. sales should not be matched to certain home market sales.

We disagree with Venus that the home market sales in question are outside the ordinary course of trade. Section 771(15) of the Act defines "ordinary course of trade" as {t}he conditions and practices which, for a reasonable time prior to the exportation of subject merchandise, have been normal in trade under consideration with respect to merchandise of the same class or kind." Additionally, 19 CFR 351.102 specifies that sales may be determined to be outside the ordinary course of trade, based on an evaluation of all the circumstances particular to the sales in question, if such sales or transactions have characteristics that are extraordinary for the market in question. Examples of sales that might be treated as being outside the ordinary course of trade are merchandise sold at aberrational prices or with abnormally high profits. See 19 CFR 351.102(b).

Although Venus has argued that the home market sales in question are high-priced, Venus has not provided any evidence that the prices are aberrational or yielded abnormally high profits. In fact, in arguing that the home market sales have significantly higher prices, Venus compares prices across grades.⁷⁵

Venus further argues that the volume of home market transactions is small compared to the volume of the U.S. sales transactions to which they are being compared. However, our analysis of whether particular sales are in the ordinary course of trade focuses on characteristics in the

⁷² See, e.g., Venus' May 14, 2008, Section AQR at A-11 and A-13; Venus' July 2, 2008, Section BQR at B-17 to B-18, and B-28 to B-29.

⁷³ See Venus' October 24, 2008, Supp. AQR at 24.

⁷⁴ See Sieves' June 8, 2009, AQR at 25.

⁷⁵ See Venus' Case Brief at 7.

home market, *i.e.*, whether the sale is extraordinary in the market in which it is being made, and not compared to other markets. Moreover, low sales volume alone does not render a sale outside the ordinary course of trade. See Notice of Preliminary Determination of Sales at Less Than Fair Value and Postponement of Final Determination: Structural Steel Beams From South Korea, 65 FR 6984 (February 11, 2000) (unchanged for final); and Thai Pineapple Public Co. v. United States, 946 F. Supp. 11, 16 (CIT 1996).

Venus additionally argues that the home market sales were made at a different level of trade than the U.S. sales to which they are being compared. However, as Petitioners point out, Venus reported to the Department that it sells to the same level of trade in the home and U.S. markets.⁷⁶

Venus' final arguments relate to alleged physical differences in the merchandise being compared, contending that they are made of different grades of stainless steel and have different diameters. Both grade and diameter are included in our matching characteristics, and in this instance the differences do not preclude comparing these products. For a further discussion of the Department's practice on comparing similar merchandise, see Comment 6 above, "Comparison of Certain Similar Merchandise Sold in the Home Market."

Comment 8: Offsetting Negative Margins

Venus' Argument: Venus objects to the Department's practice of zeroing negative margins in administrative reviews as it alleges that the practice is not in accord with the WTO agreement. Moreover, Venus claims that the practice of zeroing only in recent investigations and not in reviews is discriminatory. Because reviews are only initiated upon request and because each review is based on new facts, the Department should treat it as a new case.

Finally, Venus contends that there is no administrative burden, as identified by the Department in its Zeroing Notice,⁷⁷ because the information presented in this review is new and has no connection to the original case investigation in 1995.

Petitioners' Rebuttal: Petitioners assert that the Department should reject Venus' zeroing arguments because it recently considered, and rejected, the same arguments presented in Brake Rotors from the PRC.⁷⁸ Specifically, in Brake Rotors from the PRC, the Department stated that the current WTO proceedings with respect to zeroing (US – Zeroing (EC), US – Softwood Lumber, and US-Zeroing (Japan)) had no bearing on whether the Department's denial of offsets was consistent with U.S. law and the Department continued to deny offsets to dumping based on

⁷⁶ See, Venus' May 14, 2008, AQR at A-11 and A-13; Venus' July 2, 2008, Section BQR at B-17 to B-18 and B-28 to B-29; and Venus' October 24, 2008, Supp. AQR at 24.

⁷⁷ See Antidumping Proceedings: Calculation of the Weighted-Average Dumping Margin During an Antidumping Investigation; Final Modification, 71 FR 77722, 77725 (December 27, 2006) ("Zeroing Notice").

⁷⁸ See Brake Rotors From the People's Republic of China: Final Results of Antidumping Duty Administrative and New Shipper Reviews and Partial Rescission of the 2005-2006 Administrative Review, 72 FR 42386 (August 2, 2007) and accompanying Issues and Decision Memorandum at 22-24 (Comment 7) ("Brake Rotors from the PRC").

export transactions that exceeded normal value.⁷⁹ Petitioners maintain that the Department has noted on several occasions that section 771(35)(A) of the Act defines the dumping margin as the “amount by which the normal value exceeds the export price or constructed export price of the subject merchandise.” Petitioners assert that the Department interprets this definition to mean that a dumping margin only exists when the normal value is greater than the EP or CEP, and, thus, no dumping margin exists when normal value is equal to or less than EP or CEP. Petitioners note that the U.S. Court of Appeals for the Federal Circuit has consistently upheld this interpretation.⁸⁰

Additionally, Petitioners argue that the Department may not modify its current practice for zeroing in administrative reviews until it completes the notification and comment process required by the Uruguay Round Agreements Act (“URAA”).⁸¹ Since the Department has not yet invited public comment on its zeroing practice, Petitioners contend the Department must continue its zeroing practice in administrative reviews.

In support for Petitioners’ position to continue zeroing in administrative reviews, Petitioners note that the Secretary has broad discretion in interpreting and executing the antidumping law. See Smith-Corona Group v. United States, 713 F.2d 1568, 1571 (Fed. Cir. 1983). Moreover, Petitioners cite to SSSSC from Mexico,⁸² and argue that in interpreting the antidumping statute, the Department has long recognized that the statutory regime as a whole is best (and most fairly) effectuated when negative margins of dumping are treated as non-dumped sales, but not allowed to cancel out positive margins.

Moreover, Petitioners argue that it is not the responsibility of the Department to interpret and apply the WTO agreements or the decisions of its dispute settlement bodies, as Venus contends. Petitioners point out that Congress has provided a procedure as part of the URAA process through which the Department may change a regulation or practice in response to a WTO report. See 19 USC 3533(g). According to Petitioners, it is clear that Congress did not intend for WTO reports to supersede the Department’s discretion to interpret the Act. See 19 USC 3533(g)(4).

⁷⁹ See Brake Rotors from the PRC at Comment 7, citing United States - Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R (January 9, 2007) (“US-Zeroing (EC)”), United States-Final Determination on Softwood Lumber from Canada, WT/DS264/AB/R (Aug. 11, 2004) (“US-Softwood Lumber”), and United States-Measures Relating to Zeroing and Sunset Reviews, WT/DS322/AB/R (Jan. 9, 2007) (“US-Zeroing (Japan)”).

⁸⁰ See Brake Rotors from the PRC, at Comment 7, citing 19 USC 3538; Koyo Seiko Co. v. United States, 543 US 976 (2004); Timken Co. v. United States, 354 F.3d 1334, 1342 (Fed. Cir. 2004); Corus Staal BV v. Department of Commerce, 395 F.3d 1343, 1347-49 (Fed. Cir. 2005) (“Corus I”); and Zeroing Notice at 71 FR 77724.

⁸¹ See 19 USC 3533(g)(1)(C); see also Certain Polyethylene Terephthalate Film, Sheet and Strip From India: Final Results of Antidumping Duty Administrative Review, 71 FR 47485 (August 17, 2006) and accompanying Issues and Decision Memorandum at Comment 1.

⁸² See Stainless Steel Sheet and Strip in Coils From Mexico; Final Results of Antidumping Duty Administrative Review, 70 FR 3677 (January 26, 2005) (“SSSSC From Mexico”) and accompanying Issues and Decision Memorandum at Comment 16.

Therefore, Petitioners assert that the Department should base its determination on its own assessment of the purposes and goals of the statute.

Lastly, Petitioners state that the Department should reject Venus' request that the Department refrain from zeroing in the instant review because Venus did not present any information that would discount or discredit the Department's analysis in Brake Rotors from the PRC, or submit any information to persuade the Department to alter its current practice of zeroing in administrative reviews, in general. Furthermore, Petitioners contend that the Department should assign total AFA to Venus and Sieves.

Department's Position: We have not changed our calculation of the weighted-average dumping margin as suggested by Venus for these final results of review.

Section 771(35)(A) of the Act defines "dumping margin" as the "amount by which the normal value exceeds the export price or constructed export price of the subject merchandise." Outside the context of antidumping investigations involving average-to average comparisons, the Department interprets this statutory definition to mean that a dumping margin exists only when normal value is greater than EP or CEP. As no dumping margins exist with respect to sales where normal value is equal to or less than EP or CEP, the Department will not permit these non-dumped sales to offset the amount of dumping found with respect to other sales. The U.S. Court of Appeals for the Federal Circuit has held that this is a reasonable interpretation of the statute. See, e.g., Timken Co. v. United States, 354 F.3d at 1342; and Corus I.

Venus cites to the Zeroing Notice, where the Department stated that it would no longer make average-to-average comparisons in investigations without providing offsets for non-dumped comparisons. However, in doing so, the Department declined to adopt any other modifications concerning any other methodology or type of proceeding, such as administrative reviews. See id. 71 FR at 77724.

With respect to US-Zeroing (Japan), United States-Final Anti-Dumping Measures on Stainless Steel from Mexico, WT/DS344/AB/R (Apr. 30, 2008), United States-Continued Existence and Application of Zeroing Methodology, WT/DS350/AB/R (Feb. 9, 2009), the steps taken in response to these reports do not require a change to the Department's approach of calculating weighted-average dumping margins in the instant administrative review.

For all these reasons, the various WTO Appellate Body reports regarding "zeroing" do not establish whether the Department's denial of offsets in this administrative review is consistent with U.S. law. Accordingly, and consistent with the Department's interpretation of the Act described above, in the event that any of the export transactions examined in this review are found to exceed normal value, the amount by which the EP exceeds normal value will not offset the dumping found in respect of other transactions.

Comment 9 Whether to Rely on Double-Bracketed Information

By letter dated June 30, 2009, the Department informed Petitioners that it would not base its determination on "double-bracketed" information, i.e., proprietary information that is not

released under administrative protective order, because doing so would result in impairment of the due process rights of the party not able to see the information.

Petitioners' Argument: Petitioners urge the Department to reconsider its position on this matter because they allege that it is contrary to the statute, the Department's regulations, and past practice. According to Petitioners, the statute at 19 U.S.C. § 1677f(b)(1)(B)(ii)(II) anticipates that parties may submit relevant information that may not be available to every interested party. Similarly, the Department's regulations at 19 CFR 351.304(a)(1)(ii) provide that parties may submit proprietary information that cannot be released under protective order. Petitioners contend that once the Department has accepted this information for the record, nothing in the statute or regulations permits the Department to disregard the information. According to Petitioners, it would be illogical to allow parties to submit this information, but the Department somehow be authorized to disregard it. Conversely, if it cannot be evaluated by the Department, the statute would not have allowed for the submission of this information.

Petitioners further contend that the position taken by the Department in its June 30 letter is a marked change in policy as Petitioners are aware of no cases in which the Department has refused to take into consideration information submitted by a petitioner or respondent in these circumstances.

Petitioners refute the Department's claim that use of this information would violate the respondent's right to due process. First, they claim that foreign producers do not have a due process right to export to the United States, citing American Ass'n of Exporters and Importers – Textile and Apparel Group v. United States, 751 F.2d 1239, 1250 (Fed. Cir. 1985). Instead, Petitioners contend, the foreign producer is required to abide by U.S. laws and, as explained earlier, the U.S. permits the submission of this data to the Department. Second, Petitioners point out that only the respondents' counsel are entitled to review proprietary data so a respondent could never defend itself against any type of proprietary data. In this case, the respondent has chosen not to be represented by counsel and, hence, has relinquished any alleged "due process right" to defend itself. Finally, Petitioners claim that imposition of this "new, unprecedented, and unlawful" policy will have a harmful and chilling impact on enforcement of the antidumping law because Petitioners cannot submit information critical to the case and respondents will be encouraged to submit erroneous, misleading and false information that will go rebutted.

Venus' and Sieves' Rebuttal: Venus and Sieves state that the Department should not allow Petitioners to submit double-bracketed business proprietary information because of Venus' inability to respond to Petitioners' allegations or question the submitted evidence. Venus and Sieves argue that, while it is correct that the respondent cannot review Petitioners' proprietary data when the respondent is represented by counsel, in this case, the respondent does not have counsel. Thus, for Venus and Sieves to have due process, they contend that they should have the same rights to view Petitioners' proprietary data as if they were represented by counsel.

In addition, Venus states that for this review, all of the allegations made by Petitioners have been false. In response to these allegations, Venus has asked AMS for a factual statement, and would like to submit this statement for the Department's review.

Department's Position: As the Department explained in its June 30, 2009 letter, the Department finds it inappropriate to rely on the double-bracketed information submitted in this case for the purposes of its final determination. See Letter to Grace W. Kim, Esq., Kelley Drye & Warren, LLP, entitled "Claim for the Clear and Compelling Need to Withhold Business Proprietary Information from Release Under Administrative Protective," dated June 30, 2009. The Department explained that while section 777(c)(1)(A) of the Act establishes the provision for a certain type of double-bracketed business proprietary information ("BPI") to be submitted in its proceedings, the legislative history of the statute indicates that such information is expected to be used rarely. H.R. Conf. Rep. No. 100-576, 623 (1988). The Department noted that the legislative history indicated that the double-bracketed information "might include trade secrets, customer names, and the names of consulting firms conducting market research." H.R. Rep. No. 100-40, 140 (1987).

Accordingly, the Department has previously accepted double-bracketed BPI on the record of its proceedings. However, in practice, the type of double-bracketed BPI accepted by the Department has been limited to the personal identity of market researchers, the names and designations of the sources of information, or customer names obtained during an antidumping investigation in accordance with section 771(c)(1)(A) of the Act.⁸³ In this case, however, the double-bracketed information is not limited to the identity of market researchers or other sources of information. Instead, the double-bracketed BPI in this proceeding includes numerous substantive allegations challenging the veracity of the respondent's questionnaire responses.

As the Department explained in its June 30, 2009 letter, it is concerned about Venus' inability to respond to allegations or question evidence that it is not permitted to see. Moreover, the Department has not found any prior proceeding in which it has accepted such allegations and evidence as double-bracketed BPI, and then based its final determination on such information. Petitioners cite to American Ass'n of Exps. & Importers-Textile and Apparel Group v. United States, 751 F.2d at 1250, arguing that "a foreign producer does not have a due process right to export goods into the United States." See Petitioners' Case Brief at 45. Petitioners further argue that the Department's decision is contrary to the statute. However, the Department did not make its decision based on the assumption that respondents had a "due process right to export." Rather, the Department based its decision on its concerns that relying on the double-bracketed information would impair Venus' right to due process in the course of this proceeding before the Department.

Further, we note that section 782(g) of the Act sets forth parties rights to comment on the information submitted in the course of a proceeding before the Department. Since the double bracketed information submitted by Petitioners includes numerous substantive allegations challenging the veracity of the respondent's questionnaire responses, Venus' inability to see and respond to these allegations, impairs its right to comment as outlined in section 782(g) of the

⁸³ See Fresh Garlic from the People's Republic of China: Final Results and Rescission, In Part, of Twelfth New Shipper Reviews, 73 FR 56550 at Comment 4 (September 29, 2008); Fresh Garlic from the People's Republic of China: Final Results and Partial Rescission of the Eleventh Administrative Review and New Shipper Reviews, 72 FR 34438 at Comment 2C (June 22, 2007); Final Determination of Sales at Less Than Fair Value; Stainless Steel Sheet and Strip in Coils From Germany, 64 FR 30710 at Comment 32 (June 8, 1999).

Act. Petitioners argue that since Venus is not represented by counsel, it has “relinquished” its due rights in this proceeding. However, even had Venus retained counsel, its counsel would not have been able to see or comment on the double bracketed information. In other words, even had Venus retained counsel, its counsel would only have been able to see or respond to single bracketed information. Thus, had Venus retained counsel, it would still be impaired in its ability to participate fully, were the Department to take the double bracketed information into consideration.

Petitioners contend that the double-bracketed information was submitted properly in accordance with statutory and regulatory criteria, and was accordingly accepted by the Department. Petitioners further argue that having accepted this information, the Department may not decline to use it. However, in this case, the Department must balance Petitioners’ ability to submit double-bracketed information against Venus’ statutory right under section 782(g) to comment on information and respond to allegations.

Petitioners argue the Department’s decision constitutes a change in policy and that Petitioners are aware of no cases in which the Department has refused to take into consideration information submitted by a petitioner or respondent in these circumstances. However, as the Department noted in its letter, the extensive and substantive nature of the double-bracketed information submitted in this proceeding is in itself a departure from such submissions in prior cases, where double-bracketed information is limited to the personal identity of market researchers, the names and designations of the sources of information, or customer names obtained during an antidumping investigation in accordance with section 771(c)(1)(A) of the Act.

Accordingly, the Department continues to find it inappropriate to rely on this information for the purposes of its final results.

RECOMMENDATION

Based on our analysis of the comments received, we recommend adopting all of the above positions. If these recommendations are accepted, we will publish the final results of this administrative review in the Federal Register.

AGREE _____

DISAGREE _____

Ronald K. Lorentzen
Acting Assistant Secretary
for Import Administration

Date